No. 12,527

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONSHOREMEN'S AND WAREHOUSEMEN'S UNION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,
Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The petition for a rehearing of appellants herein respectfully alleges as follows:

I.

BY CONSTRUING SEC. 303(a)(4) IN ISOLATION FROM THE REST OF THE STATUTE, THE COURT REACHES A RESULT PLAINLY AT VARIANCE WITH THE LEGISLATIVE HISTORY AND THE CONGRESSIONAL PURPOSE IN ENACTING THE SECTION.

By its decision in this case, the Court has held that Section 8(b)(4)(D) of the Labor Relations Act,

and Section 303(a)(4) of the Act, are not addressed to the same conduct. In short, it has held that particular activities by a labor organization, while perfectly lawful under the portions of the Act defining unfair labor practices, are nevertheless unlawful and subject to suit for damages under a section of the Act whose meaning Congress intended to be identical with the unfair labor practice sections thereof.

In so holding, this Court adopts a construction of Section 303(a)(4) completely at variance with the meaning of that Section as advanced not only by appellants, but by appellee itself. It is to be recalled that in oral argument appellee conceded that if Section 10(k) gave the Board the right to determine which labor organization was entitled to the disputed work, the judgment of the trial court in its favor required reversal. This position followed from the recognition by appellee that Section 303(a)(4), having been derived from Section 8(b)(4)(D), and having been enacted solely to supplement the sanctions available for violations of that Section, made unlawful only such conduct as constituted an unfair labor practice under Section 8(b)(4)(D).

Because of the concession by the appellee that Section 303(a)(4) was identical in meaning with Section 8(b)(4)(D), appellants did not think it necessary to bring to the attention of the Court more than one portion of the clear and overwhelming legislative history that such was the case. The statement by Representative Lesinski that "* * * employers are given a cause of action [in Sec. 303] to recover any damages caused

by the activities made unfair by Section 8(b)(4)",[1] was but a single instance of unanimous Congressional intention to the same effect which appears in the Legislative History of the Labor Management Relations Act (hereinafter called "Legislative History"). Throughout the debate in the Senate on the amendment of Senator Taft, which became Section 303 of the Act, not only Senator Taft himself, but all other Senators who spoke, both in favor of or against the amendment, were unanimous in considering the purpose of the amendment as simply to create an additional remedy in damages for activities which constituted unfair labor practices under Section 8(b)(4). These excerpts from the Legislative History are set forth in the margin.[2]

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[1]Legislative History of the Labor Management Relations Act. Vol. 1, p. 912, quoted in our Opening Brief, p. 37.

[2]"Mr. Pepper. Mr. President, I had assumed that the Ball amendment and the Taft amendment had both, in defining the boycott or the jurisdictional strike, employed substantially the same language as is used in section 8 of the bill, where those things are made an unfair labor practice. It just dawned on me that the Senator has made it unlawful—not an unfair labor practice, but he has made it unlawful to engage in a boycott or in a jurisdictional strike. * * *

"* * * was it the desire of the Senator from Ohio to make those acts unlawful?

"Mr. Taft. That is correct. *I may say that the definition is exactly the same as the definition we had of an unfair labor practice.* The effect of making it unlawful is simply that a suit for damages can be brought for that kind of thing. There is no criminal penalty of any sort." (Emphasis added.) (Legislative History, Vol. 2, p. 1371.)

"Mr. Pepper. * * *

"In addition to that, the Senator from Ohio proposes to make the basis of a substantive suit at law for damages what the bill

In the face of this overwhelming evidence of legislative intention, the Court has nevertheless held that Section 303(a)(4) does not cover the same conduct as that proscribed by Section 8(b)(4)(D). The justification offered for such a holding is simply that the plain language of the Section requires it. The diffi-

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in its principal capacity describes as an unfair labor practice. * * *" (Legislative History, Vol. 2, p. 1390.)

"Mr. Murray. * * *

"The bill as reported by the committee already outlaws the activities in question by making them unfair labor practices, and even enables the National Labor Relations Board to obtain an immediate injunction while it is conducting a hearing on the issue. We are led to believe that the only question that now remains is whether we should add to these sanctions the suit for damages contemplated by the amendment offered by the Senator from Ohio, or the damage suit, injunction, and antitrust prosecution contained in the amendment offered by the Senator from Minnesota. * * *" (Legislative History, Vol. 2, p. 1366.)

"Mr. Ball. I am sorry; if the Senator from Michigan will read subsection (1) of section 10 of the committee bill, on page 33, he will find that no hearing is required. There is simply an investigation by a regional attorney. In any event, *we are defining very clearly, in this amendment and in the pending bill, secondary boycotts and jurisdictional strikes and the definition is the same.* We are defining clearly what we want to make unlawful. * * *" (Emphasis added.) (Legislative History, Vol. 2, p. 1352.)

"Mr. Pepper. I do not want to leave the Senator under a misapprehension. I am not in favor of the damage suit part of the amendment. I do not see anything to be gained by declaring such an act to be unlawful in any respect. If the Senator wishes to give the commission of some acts legal significance and make them the subject of a suit for damages, he can do so without running the risk of becoming involved with the question of criminal prosecution by leaving out the delaration of unlawfulness altogether and either calling it an unfair labor practice, as we do in the body of the bill, or simply say that the commission of such acts shall be the basis for suits in the Federal courts.

Mr. Taft. Is not that what I do when I say that it shall be unlawful for the purposes of this section? Does not that cover the case? It is not unlawful for any other purpose." (Legislative History, Vol. 2, p. 1374.)

culty with this position of the Court is that it ignores the very authorities on statutory construction applied by this Court in another portion of its opinion in this case. As this Court said in discussing the question of whether the trial court was a "district court of the United States" within the meaning of Section 303:

> "Upon at least two occasions the Supreme Court refused to construe the literal language of statutes in a manner which would disregard and thereby frustrate the obvious purpose and policy of the legislation involved and produce unreasonable or absurd results. We adopt the rationale of the rule applied in these cases." (Opinion, p. 12.)

The following language from *U. S. v. American Trucking Associations,* 310 U.S. 534, 543-4, which was quoted by the Court in the margin of its opinion, is particularly applicable here:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is avail-

> able, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' * * *''

It is submitted that this salutary rule of statutory construction should be applied in the Court's determination of the meaning of Section 303(a)(4). The reasons for utilizing that rule in an aspect of this case dealing with procedure are present with even more force in the construction of a section which lays down substantive law. Surely the results of the construction of Section 303(a)(4), which this Court reaches by relying on its "plain language", are unreasonable in the light of the Legislative History we have cited. Further, such construction is plainly at variance with the purpose of Congress, explained in detail in the several briefs filed by appellants, to resolve jurisdictional disputes on their merits, rather than to outlaw them indiscriminately. (Opening Brief, pp. 43-48; Reply Brief, pp. 10-11.) This policy is not even discussed by the Court in its Opinion, yet it is effectively frustrated by the Court's holding, for under it unions can be penalized, even though they comply with a determination of the Board concerning who is entitled to disputed work.

The "plain language" construction adopted by the Court ignores the policy of Congress expressed in Section 10(k) to encourage parties to jurisdictional disputes to comply with the Board's determination of them.[3]

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[3]Section 10 (k) provides: "Upon compliance by the parties to the dispute with the decision of the Board * * *, such charge shall be dismissed."

In *Los Angeles Building & Construction Trades Council (Westinghouse Electric Corp.)*, 94 N.L.R.B. No. 63, 28 L.R.R.M. 1058, decided by the Board since the decision here was rendered, the Board again construed Section 10(k) to mean that a strike, covered by the "plain language" of Section 8(b)(4)(D), which occurs prior to a Board determination of the dispute under 10(k), does not constitute a violation of Section 8(b)(4)(D).[4]

According to the Board, only a strike which occurs after a 10(k) determination adverse to the striking union can violate Section 8(b)(4)(D). Under the

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[4]Earlier in the case, the Board had issued a 10 (k) determination adverse to the labor organizations involved, against which 8 (b) (4) (D) charges had been filed. (83 N.L.R.B. 477.) A hearing then took place on the question of whether the respondent unions had committed the unfair labor practice defined in Section 8 (b) (4) (D). Based on that hearing, which did not consider events following the Board's 10 (k) determination, the Trial Examiner found that Section 8 (b) (4) (D) had been violated. The Board remanded the case to the Trial Examiner, stating in the course of its order:

> "The Respondents contended, inter alia, that they had complied with the Board's 10 (k) determination in this case. No evidence with respect to such compliance or noncompliance was adduced at the hearing before the Trial Examiner.
>
> "We are of the opinion that the intent of Congress was that the General Counsel should allege and prove noncompliance with our 10 (k) determination in 8 (b) (4) (D) proceedings. Accordingly, we shall reopen the record in this case, and remand it to the Trial Examiner to give the General Counsel an opportunity to amend his pleadings and to introduce evidence to sustain his burden of proof." (Footnotes omitted.)

Thereafter, following an additional hearing, the Trial Examiner again found that the respondent unions had violated Section 8 (b) (4) (D), basing his finding on a strike called by the union *before* the Board's 10 (k) determination had been made. In reversing the Trial Examiner's finding, the Board said:

> "Clearly, the strike *before* the determination cannot prove noncompliance with the determination."

There being no evidence that the strike had continued after the 10 (k) determination, the Board dismissed the complaint.

Opinion in this case, however, the unions exonerated by the Board could be found liable in damages for the strike which had occurred before the Board's 10 (k) determination, and yet had ceased upon such determination. Such a result does not encourage compliance with the Board's resolution of the dispute. It does not, as Congress intended, give an employer an additional remedy for activities which are unlawful under the Labor Relations Act; on the contrary, it creates a new sanction which Congress never intended to create against lawful, primary, concerted activities.

II.

THE COURT'S CONSTRUCTION OF SECTION 303(a)(4) LEADS TO RESULTS INCONSISTENT WITH THE ADMINISTRATION BY THE NATIONAL LABOR RELATIONS BOARD OF SECTION 8(b)(4)(D).

In its Opinion, this Court avoids a determination of the correctness of the interpretation by the Board of Section 8(b)(4)(D), of which the abovementioned case is the latest example. This is done on the ground that, under the facts of this case, the Board could not fail to make a determination under 10(k) which was adverse to appellants here, and hence could not fail to agree that a strike by appellants was unlawful.

It is submitted that such a view simply begs the question. The real question that this Court must decide, and which it has failed to do, is whether a strike *before* a 10(k) determination is lawful under Section 8(b)(4)(D) and yet unlawful under Section 303(a)

(4). The Court must determine whether, in the face of the "plain language" of Section 8(b)(4)(D), the Board is correct in holding that a strike within its terms, which takes place before an adverse determination under section 10(k), is lawful. In the light of the intent of Congress to make Section 8(b)(4)(D) and Section 303(a)(4) identical in meaning, the strike by appellant Local 16 against appellee, during the period before the Board's determination adverse to it, could not possibly be lawful under Section 8(b)(4)(D) and unlawful under Section 303(a)(4). Either the principle laid down by the Board that the strike was lawful before the determination is incorrect, and this Court should so hold, or the judgment of the trial court to the contrary is erroneous, and should be reversed. A reliance on the "plain language" of Section 303(a)(4) to avoid such a determination leads this Court to the very unreasonable results and frustration of Congressional purpose that are condemned by the authorities on statutory construction previously cited, to which this Court adheres.

III.

THE COURT CONFUSES THE QUESTION OF WHAT CONDUCT IS PROHIBITED BY SECTION 303(a)(4) WITH THE QUESTION OF WHEN AN ACTION BASED ON THE SECTION CAN BE MAINTAINED.

As we explained at length in our Opening Brief, had Congress intended unqualifiedly to penalize strikes of the character involved here and in the *Los Angeles*

Building Council case, it would have adopted the proposals of the House with reference to jurisdictional disputes. (Opening Brief, pp. 43-48.) Instead, as we have demonstrated, it intended to make strikes in connection with such disputes unlawful only when persisted in after the Board had determined that the work in question did not belong to employees represented by the striking union. It is for this reason that Court action under Section 303(a)(4) must await Board action under Section 10(k). Unless a determination under Section 10(k) has occurred, no criterion exists by which to determine whether the activities in question are lawful or unlawful. After the Board's 10(k) determination has been made, a strike by a union will either remain lawful, or become an unfair labor practice and actionable, depending upon the determination. If the Board determines that the striking union is entitled to the work in question, it would be absurd to hold that a strike to seek such work was unlawful. Conversely, it is only when a strike is commenced or continues in the face of an adverse Board determination under 10(k) that it is unlawful, under either Section 8(b)(4)(D), or Section 303(a)(4).

It is respectfully submitted that the Court overlooks this fundamental relationship between Section 10(k) and Section 303(a)(4) when it states that "nowhere in the Legislative History do we find any indication of an intention to have such civil action for damages await the outcome of proceedings of the National Labor Relations Board. The plain purpose was to provide direct court action by the injured

party as a further deterrent against engaging in the prohibited conduct." (Opinion, page 19.) We have agreed with the Court that actions for damages under Section 303 need not await cease and desist orders of the Board under Section 8(b)(4), but may proceed simultaneously with, or even before, Board hearings on 8(b)(4) complaints. (Reply Brief, pp. 18-19.) But a Board complaint cannot issue under Section 8(b)(4)(D) until a Board determination under Section 10(k) has taken place. Similarly, until a Board determination adverse to the union is made under Section 10(k), the conduct addressed by Section 303(a)(4) is not prohibited. Were it otherwise, a union that the Board had held was entitled to disputed work could be sued for seeking to require employer compliance with the Board's award.

The legislative history relied on by the Court is consistent with this analysis. That history demonstrated two things: (1) that the conduct prohibited by Section 303(a)(4) was to be determined by the meaning of Section 8(b)(4)(D); (2) that actions could take place under Section 303(a)(4), based on the conduct prohibited by Section 8(b)(4)(D), before a Board order under 8(b)(4)(D) had been issued.

IV.

THE FAILURE OF CONGRESS EXPRESSLY TO RELATE SECTION 303 (a) (4) TO SECTION 10 (k) IS EXPLAINABLE BY THE ORIGIN OF THE FORMER SECTION.

Section 303, of which 303(a)(4) was a part, was added as an amendment by Senator Taft to the bill as reported by the committee, during the Senate debate on the bill. As the debate in the Senate shows, inadequate attention was given to the problem of drafting the language of the Taft amendment so as to make it consistent with the unfair labor practice definitions from which it was taken.[5]

In view of these circumstances, the "plain language" of Section 303(a)(4) should be no more determinative of its meaning than was the "plain language" of Section 303(b) referring to "any district court of the United States". In holding the trial court to be included within the meaning of that term, this Court went beyond the plain meaning which that term is given in the Judiciary Code (28 U.S.C.A.), and examined the theory and policy of the Act, as well as the provisions of the Act *as a whole*. It should do no less with Section 303(a)(4). If this is done,

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[5] "Mr. Morse. * * *

"If the Senator will indulge me, may I say further that I think all the discussion, the amendments that are now proposed, and the corrections that have been made here on the floor of the Senate to the pending amendment, show that here is a problem that ought to be referred for further study to the committee proposed in another section of the committee bill. I think the pending Taft amendment is a perfect example of hastily devised legislation. I think the problem involved in it ought to go back to committee. I think we ought to take the committee bill and stop muddying the water, so to speak, by adding more and more amendments to it." (Legislative History, Vol. 2, pp. 1380-1381.)

then there can be no doubt that the conduct prohibited by Section 303(a)(4) is not defined by that Section alone, but by the Section construed together with Section 10(k), as is the case with Section 8(b)(4)(D).

V.

CONCLUSION.

To borrow the words of this Court in another portion of its Opinion, "no plausible or acceptable reason has been suggested * * * as a basis for the conclusion that Congress intended to create" in Section 303(a)(4) an action for damages for conduct which was perfectly lawful under Section 8(b)(4)(D), with which Section 303(a)(4) was intended to be identical. We have demonstrated that the separation which the Court has made between the two sections cannot be justified in the light of the unambiguous legislative history and purpose of both sections. Because of the unreasonable results "plainly at variance with the policy of the legislation as a whole" produced by the language of Section 303(a)(4) taken in isolation, such language should yield to the purpose of the section, which was to prohibit the same conduct defined by Section 8(b)(4)(D).

By virtue of the position it has taken, this Court has not determined whether the Board's construction of 8(b)(4)(D), upon which appellants rely, is correct. If it is, the judgment of the trial court is erroneous, since it has held to be unlawful, conduct which

is lawful under Section 8(b)(4)(D). It is respectfully submitted that this Court should grant appellants' petition for a rehearing to consider and decide whether the conduct proscribed by Section 8(b)(4)(D) is that which the Board has determined to be the case, and, following such determination, should render its opinion that the judgment of the trial court must be reversed.

Dated, San Francisco, California,
June 1, 1951.

Respectfully submitted,
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Certificate of Counsel.

It is Hereby Certified that in the judgment of the undersigned, the foregoing petition for a rehearing is well-founded, and is not interposed for delay.

Dated, San Francisco, California,
June 1, 1951.

Allan Brotsky,
Of Counsel for Appellants and Petitioners.